

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADVANCED THERMAL SYSTEMS, INC.,¹

Employer,
and

Case No. 27-RC-7921

LABORERS' LOCAL UNION 295,

Petitioner,
and

ADVANCED THERMAL SYSTEMS, INC.,

Employer,
and

Case No. 27-RC-7922

UTAH PLASTERERS & CEMENT MASONS, LOCAL 568,²

Petitioner.

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner in Case 27-RC-7922 appears as amended at the hearing.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) (7) of the Act, for the following reasons:

Petitioner Laborers' Local Union 295, hereinafter called Petitioner Laborers', seeks to represent, pursuant to an amendment of its petition at the hearing, the following unit:

All laborers performing work related to concrete work who are employed by the Employer in the State of Utah, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

Petitioner Utah Plasterers & Cement Masons, Local 568, hereinafter called Petitioner Plasterers, seeks to represent, pursuant to an amendment at the hearing, the following unit:

All concrete finishers employed by the Employer in the State of Utah, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

The Employer raised no issue with regard to the appropriateness of the above-described bargaining units. However, the Employer took the position that these petitions should be dismissed by the Regional Director on two grounds.

First, the

~ The Employer is a Utah corporation engaged in the construction industry as a subcontractor for plastering, drywall installation and concrete work within the State of Utah. Annually, the Employer, in the course and conduct of its business operations described above, purchases and receives at its Utah facilities goods valued in excess of \$50,000 from other enterprises located within the State of Utah, each of which other enterprises had received these goods directly from points outside the State of Utah. Based upon these stipulated facts and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Employer contended that its sole current construction project would be completed within several weeks of the hearing, which was held on May 5, 1999, and that any future work, aside from two small jobs to be performed in June and July, was too speculative to warrant the conducting of an election. Second, the Employer contended that there was no reasonable expectancy that current employees would be recalled to work on future jobs after being laid off at the completion of the Employer's current project.

The testimony of the Employer's owner Juan Mucino and its bookkeeper Jack Wollam establishes that the Employer is engaged in several businesses including mechanical installation, hazardous waste cleanup and concrete work on construction projects. The Employer began performing concrete work during the summer of 1998. The Employer qualifies as a minority business, formally referred to as a disadvantaged business enterprise(DBE), and since last summer has worked as a subcontractor for concrete work for several different general contractors including Granite Construction and Meadow Valley Construction. The Employer was a subcontractor on four jobs from Granite Construction in 1998 totaling approximately \$100,000. The Employer's current job involves building curbs, gutters and picnic tables at a highway rest area as a subcontractor for Meadow Valley. This job is valued at approximately \$251 ~000. It is referred to as the Grassy Mountain job and is projected to last about 30 days total, which would result in completion in late May.

On the date of the hearing, the Employer employed five laborers and three concrete finishers, all on the Grassy Mountain job. Chris Chase is the Employer's Project Manager. The record establishes that Chase has the authority to hire employees and has overall responsibility for the project. I, therefore, conclude that he is a supervisor within the meaning of the Act.

Thomas Vance is the general foreman on the job. The record is unclear as to which of the two bargaining units he would fit into should he not be found to be a supervisor. The parties both took the position that his job duties were subject to change on future jobs and that no finding as to his supervisory status should be made based upon the record herein.

The record establishes that the Employer hired its current employees based upon their past work history with the Employer or by word-of-mouth. The Employer has not advertised for employees. The Employer testified, without contradiction, that employees are laid off at the conclusion of individual jobs, and that there is no guarantee of recall rights. In staffing a new job the Employer may choose from former employees depending on their availability, or may select from among new applicants.

The Employer has been awarded two future jobs, one for concrete work in a parking lot owned by the Church of the Latter Day Saints and the other a road construction job in the City of Nephi as a subcontractor for Meadow Construction. Nephi is approximately 85 miles south of Salt Lake City. Wollam testified that the parking lot job should last for two days in June and is valued at \$12,000, while the road construction job is scheduled for two weeks in July and is valued at \$31,000.

Wade Ewell, a cement finisher employed on the Grassy Mountain job, testified that he was hired by Chris Chase after Chase, who knew him from a job

that Ewell

worked on in 1998, had solicited him to file a job application with the Employer. The record is unclear as to whether Ewell had been previously employed by the Employer or another contractor when Chase had worked with him in 1998. Ewell testified that general foreman Vance has told him that upon the completion of the Grassy Mountain job, Vance was going to the Nephi job. Ewell was unclear as to whether Vance had also invited Ewell to go to the Nephi job.

Based upon the foregoing and the record as a whole, I find that the Employer's contention that the petition should be dismissed on the grounds that future work is too speculative to warrant the conducting of an election is unsupported by the facts herein. Contrary to the facts in Davey Mckee Corporation, 308 NLRB 839 (1992), relied upon by the Employer, the Employer herein has had a series of jobs involving concrete work since the summer of 1998 and has commitments for future work involving bargaining unit positions. The instant case is distinguishable from Davey Mckee Corporation based upon this work history and future job commitments and the Employer's likely expectancy of receiving future bids for concrete work from contractors within Utah. In that regard, Mucino testified that while he does not seek out concrete work, the Employer will place bids for concrete work when contractors send the Employer notification of such work. In fact, the record establishes that, as a minority contractor, the employer has an agreement with Granite Construction

whereby Granite Construction solicits such bids from the Employer. Rather, I conclude that the Board's decision in Fish Engineering & Construction, 308 NLRB 836 (1992) in which it

distinguished that case from Davey McKee Corporation based upon facts similar to those herein, is dispositive herein.

In *Ej~fl* the Board reversed a Regional Director's dismissal of a petition. Noting the Director's findings regarding future projects, the Board stated:

Based on this undisputed evidence of the Employer's past and current work, and its bidding on future work within the unit sought by the Joint Petitioner, the Board finds that it would serve a useful purpose to conduct an immediate election...

I, therefore, do not find it inappropriate to conduct an election based upon the projected completion of the Employer's Grassy Mountain job in late May.

However, at the conclusion of the hearing the parties stipulated that since the Employer had been performing work in the cement industry for less than one year, that there were no employees who would be eligible to vote under the decision of the Board in Daniel Construction Co., 167 NLRB 1071 (1967). I do find that, in light of the parties stipulation that a Daniels eligibility formula not be used herein, it would not effectuate the purposes of the Act to direct an election on the instant petitions since the record establishes that the current employees in the bargaining units will be (aid off at the completion of the Grassy Mountain job, and there is insufficient evidence to establish that there will be a substantial likelihood of their being recalled for employment on future jobs. Given the absence of any evidence that there will be eligible employees employed after

May, 1999 I hereby dismiss the instant petitions.

IT IS HEREBY ORDERED that the petitions filed herein be, and they hereby are, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by May **27, 1999**.



Dated May 13, 1999 at Denver, Colorado

Daniel C. Ferguson,
Acting Regional Director
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